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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
| 10/827,032      | 04/19/2004  | Stewart E. Sloan     |                     | 2744             |

31083 7590 08/23/2005

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EXAMINER

BROWN, MICHAEL A

ART UNIT PAPER NUMBER

3764

DATE MAILED: 08/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/827,032

Applicant(s)

SLOAN, STEWART E.

Examiner

Michael Brown

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 06 June 2005.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 2-15 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 2-15 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Specification***

The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: There is no support in the specification for the ball being removably mounted or the hand-gripping portion being generally V-shaped.

### ***Claim Rejections - 35 USC § 112***

Claims 2-15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 2-15, the preamble recites that the claims are combination claims. However, there is no combination recited in the bodies of the claims.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 3-4, 6, 8, 11 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Haygood.

Haygood discloses in figures 1-9 a batting practice device that anticipates a combination massage device comprising an elongated handle (4, 12), that has a hand gripping portion (the opening in 4), a ball 24 that is resilient (col. 4, lines 31-34) and

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removably attached to the handle (via 26) and the hand-gripping portion is generally V-shaped (fig. 1).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haygood in view of Mitchell.

Haygood discloses in figures 1-9 a batting practice device that anticipates a combination massage device, substantially as claimed. However, Haygood does not disclose the handle being flexible or made of plastic. Mitchell teaches in figures 1-8 a flexible handle 14 having a resilient ball 12 attached at one end (fig. 1). The handle is made of plastic (col. 4, lines 38-41). It would have been obvious to one having ordinary skill in the art at the time that the invention was made that the handle disclosed by Haygood could be completely flexible as taught by Mitchell in order to allow the handle to wrap around the user's hand. The handle could be made of plastic because it is durable material that would allow the device to extend downward in order to use the ball as a massaging device on any portion of the human body.

Claims 7 and 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haygood in view of Rodriguez.

Haygood discloses in figures 1-9 a batting practice device that anticipates a combination massaging device, substantially as claimed. However, Haygood does not disclose the ball being a tennis ball or a net extending around the ball. Rodriguez teaches in figures 1-2 a tennis volley practice device comprising a ball (col. 4, lines 40-42) inside of a net 10, wherein the net and the ball are attached to a handle 1. It would have been obvious to one having ordinary skill in the art at the time that the invention was made that the tennis ball as taught by Rodriguez could be substituted for the ball disclosed by Haygood because either ball could be used to massage portions of the human body. The net material as taught by Rodriguez could be used to assist in holding the ball onto the handle.

Claims 12-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haygood in view of Mitchell, along with Killion.

Haygood discloses in figures 1-9 a batting practice device that anticipates a combination massage device, substantially as claimed. However, Haygood does not disclose the handle being flat, flexible and made of plastic. Mitchell teaches in figures 1-9 a flexible handle 16 made of plastic. Killion teaches in figure 1 a handle that is flat. It would have been obvious to one having ordinary skill in the art at the time that the invention was made that the handle disclosed by Haygood could be flexible and made of plastic as taught by Mitchell for the reason set forth above. The handle could be flat as taught by Killion because flatness is simply a different shape that doesn't provide any novelty over the prior art.

### ***Response to Arguments***

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Applicant's arguments filed June 6, 2005 have been fully considered but they are not persuasive. Applicant argues that the specification doesn't have to provide support for the hand-gripping portion being generally V-shaped because there is support for the V-shaped hand-gripping portion in claim 11. However, what ever is recited in the claims, must be recited (have support or antecedent basis) in the specification.

Applicant argues that there is no teaching in Haygood that the batting practice device can be used as a massaging device. However, Haygood discloses the same structural limitations that are recited in claim 1. Clearly, the ball and handle disclosed by Haygood are capable of being used as a massaging device. The handle would be used to hold the ball against the body. The body could be pressed against the ball to provide a massaging effect. Applicant argues that the prior art does provide any remedies for the deficiencies of Haygood. However, Mitchell was used to provide a teaching of making the handle flexible and of plastic. Rodriguez was used to provide a teaching of putting the ball in a net and having the net attached to the handle. Killion was used to teach making the handle flat.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the

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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Brown whose telephone number is 571-272-4972. The examiner can normally be reached on 5:30 am-4:00 pm Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gergory Huson can be reached on 571-272-4887. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

M. Brown  
August 15, 2005

A handwritten signature in black ink, appearing to read "Michael A. Brown", with a long horizontal flourish extending to the right.

MICHAEL A. BROWN  
PRIMARY EXAMINER